

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL PARRISH,

Plaintiff-Appellant,

v.

**NANCY A. BERRYHILL,
ACTING COMMISSIONER OF
SOCIAL SECURITY,**

Defendant-Appellee.

Case No. ED CV 16-00032 VBF(JC)

ORDER

Overruling Commissioner's Objections;

Adopting Report & Recommendation;

Reversing in Part the Commissioner's
Denial of Disability Benefits;

Remanding to the Agency for Further
Proceedings Consistent with this Order
and with the R&R

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Complaint and all of the medical and other records herein, including the parties' cross-motions for summary judgment and the briefs responding to and opposing those motions, the well-reasoned Report and Recommendation of the United States Magistrate Judge ("R&R"), defendant-appellee Commissioner's timely objections to the R&R ("Objections"), and plaintiff-appellant Parrish's timely response to the Objections.

The Court has further made a *de novo* determination of those portions of the Report and Recommendation to which objection is made. The Court concurs with and accepts the findings, conclusions, and recommendations of the United States Magistrate Judge and overrules the Objections. The Court specifically addresses

1 some of defendant's contentions in the Objections below.

2
3 **In the Objections, defendant correctly points out that “inconsistency” or**
4 **“conflict” with objective medical evidence is a germane reason for discrediting**
5 **competent lay testimony.** See Bayliss v. Barnhart, 427 F.3d 1211, 1218 (9th Cir.
6 2005) (citation omitted); Lewis v. Apfel, 236 F.3d 503, 511 (9th Cir. 2001) (citing
7 Vincent v. Heckler, 739 F.2d 1393, 1395 (9th Cir. 1984)). Here, however, neither the
8 Administrative Law Judge (“ALJ”) nor the defendant identified any *conflict* between
9 the lay statements at issue in the case and the record medical evidence. (Objections
10 at 1-4; AR 18-21).

11 **In fact, the ALJ expressly discredited the statements of the lay witness, in**
12 **pertinent part, due to a lack of *support* in the medical evidence, not any**
13 **affirmative *contradiction* with the medical record.** (AR 18) (emphasis added). An
14 ALJ may not discredit competent lay statements solely because they are “*not*
15 *supported* by medical evidence in the record.” Bruce v. Astrue, 557 F.3d 1113, 1116
16 (9th Cir. 2009) (emphasis added) (citing Smolen v. Chater, 80 F.3d 1273, 1289 (9th
17 Cir. 1996)); Massey v. Commissioner of Social Security Administration, 400 Fed.
18 Appx. 192, 194 (9th Cir. 2010) (“[An] ALJ may not reject lay testimony solely
19 because it is not supported by objective medical evidence.”) (citing *id.*); Rivera v.
20 Colvin, 2013 WL 6002445, *4 (D. Or. Nov. 12, 2013) (Mere “lack of objective
21 medical support is not a proper reason for discounting lay witness reports of a
22 claimant’s pain and other subjective symptoms.”); see, e.g., Smolen, 80 F.3d at 1289
23 (ALJ erred by rejecting lay testimony from claimant’s family members because
24 medical records did not corroborate plaintiff’s symptoms) (citing Social Security
25 Ruling (“SSR”) 88-13, 1988 WL 236011, at *3).¹ Defendant asserts, in part, that the

26
27 ¹

28 To the extent defendant suggests that Bruce is no longer good law because it relied on
“language from *Smolen* . . . which was in turn based on regulations and a Social Security Ruling
(continued...)

1 Report and Recommendation finding “that the ALJ erred in concluding that the
 2 objective medical evidence does not *support* [lay statements from Ms. George] . . .
 3 seems to suggest . . . that it is not appropriate for the ALJ to rely on [] an
 4 *inconsistency* [with record medical evidence] in evaluating third party evidence.”
 5 (Objections at 1) (Citing R&R at 10).

6 **Defendant’s misreading of the R&R appears to be based on confusion**
 7 **regarding two distinct reasons that ALJs have used when discrediting lay**
 8 **witness evidence** – “[a]ffirmative inconsistencies” between lay statements and the
 9 objective medical evidence (which may be a germane reason for rejecting competent
 10 lay evidence), and the simple *absence* of objective medical evidence supporting lay
 11 statements (which may not). *See, e.g., Rivera*, 2013 WL 6002445, at *3, *4 (“[T]he
 12 nature of [lay testimony regarding a plaintiff’s] subjective symptoms requires that
 13 courts recognize a distinction between affirmative contradiction with the medical
 14 record and mere lack of support within it.”) (citing 20 C.F.R. §§ 404.1529(c)(4) and
 15 416.929(c)(4); *Bruce*, 557 F.3d at 1116; *Bayliss*, 427 F.3d at 1218).

16
 17 **Defendant also objects that the R&R “imposes an unreasonable**
 18 **articulation obligation that is not supported by caselaw.”** (Objs at 2). While an
 19 ALJ need not “clearly link” rejection of lay statements to particular parts of the
 20 record, the ALJ’s decision must still, at a minimum, articulate “arguably germane
 21 reasons” supported by substantial evidence for discrediting competent lay evidence.
 22 *Lewis*, 236 F.3d at 512. As discussed above, the ALJ’s decision here does not do so.

23
 24 ¹(...continued)
 25 [SSR 88-13] that are no longer in force” (Objections at 1-2), this Court disagrees. *See, e.g., Rivera*,
 26 2013 WL 6002445, at *3 (“[T]he notion that agency rulings no longer support the *Smolen* line of
 27 decisions is not correct.”). Although Social Security Ruling 88-13 was superseded by SSR 95-5p,
 28 “the policy interpretations contained in [SSR 88-13] were codified in 20 C.F.R. §§ 404.1529(c)(3),
 416.929(c)(3), and *remain valid*.” *Massey*, 400 F. App’x at 194 n.1 (citing SSR 95-5p, 1995 WL
 670415, at *1 (noting “[Social Security] regulations codified . . . SSR 88-13 . . . making it
 unnecessary to retain the . . . policy interpretations in [the] Ruling[.]”) (emphasis added).

1 **Defendant also argues that a remand is inappropriate since the ALJ's**
2 **error in discrediting the lay evidence, if any, was harmless** essentially because
3 “Ms. George’s testimony essentially parrots Plaintiff’s testimony [and] the reasons
4 stated for finding Plaintiff’s testimony not credible apply equally to the ALJ’s
5 evaluation of Ms. George’s testimony.” (Objections at 3-4). Here, however, the ALJ
6 did not say that the same reasons apply to discredit the statements from both plaintiff
7 and the lay witness. **A Social Security decision may not be affirmed under the**
8 **rubric of harmless error based on a ground the ALJ did not invoke.**
9 *Brown-Hunter v. Colvin*, 806 F.3d 487, 492 (9th Cir. 2015) (cites omitted).

10
11 **In any event, defendant’s argument lacks merit. Failure to articulate**
12 **germane reasons for rejecting competent lay witness evidence may be found**
13 **harmless to the extent that** “the lay testimony described the *same* limitations as [the
14 plaintiff’s] own testimony,” the ALJ’s decision discussed the plaintiff’s own
15 subjective complaints “at length” and rejected the complaints “based on
16 well-supported, clear and convincing reasons,” and the *same* reasons for rejecting the
17 plaintiff’s statements “apply with *equal* force” to the lay witness’ statements. See
18 Molina v. Astrue, 674 F.3d 1104, 1122 (9th Cir. 2012) (emphasis added). Here, the
19 Court cannot find the ALJ’s error harmless under the foregoing analysis.

20 **First, the ALJ did not provide well-supported, clear and convincing**
21 **reasons for rejecting plaintiff’s own subjective complaints.** For example, the ALJ
22 found plaintiff’s subjective complaints “not entirely credible,” in part, because
23 plaintiff “ha[d] not generally received the type of medical treatment one would expect
24 for a totally disabled individual,” specifically “[t]he treatment records reveal the
25 [plaintiff] received routine, conservative and non-emergency treatment since the
26 alleged onset date.” (AR 18). Nonetheless, the instant medical record reflects several
27 occasions after the alleged onset date (*i.e.*, February 13, 2007) (AR 12, 256) when
28 plaintiff sought and/or received emergency room treatment, including one occasion

1 in which plaintiff was admitted to the hospital. (See, e.g., AR 549-52). The ALJ's
2 incorrect characterization of the medical evidence calls into question the validity of
3 both the ALJ's evaluation of plaintiff's credibility and the ALJ's decision as a whole.
4 *See Regennitter v. Commissioner of Social Security Admin.*, 166 F.3d 1294, 1297 (9th
5 Cir. 1999) (A "specific finding" that consists of an "inaccurate characterization of the
6 evidence" cannot support an adverse credibility determination). Moreover, aside
7 from the above-referenced summary characterizing plaintiff's treatment as "routine,
8 conservative and non-emergency," the ALJ's decision contains little or no discussion
9 about the treatment plaintiff received (as opposed to general results of objective
10 medical testing). (AR 18-20).

11 **The ALJ also appears to have discredited plaintiff's subjective statements**
12 **based on plaintiff's ability to engage in certain daily activities.** *See, e.g., Burrell*
13 *v. Colvin*, 775 F.3d 1133, 1137 (9th Cir. 2014) (inconsistencies between claimant's
14 testimony and his reported activities can be a valid reason for giving less weight to
15 his subjective complaints) (cite omitted). Nonetheless, the ALJ's conclusory
16 assertion that "[d]espite the [unspecified] alleged impairment, the [plaintiff] has
17 engaged in a somewhat normal level of daily activity and interaction[.]" followed by
18 a seriatim list of generic activities purportedly drawn from plaintiff's function report
19 (AR 18) is not a sufficient basis for rejecting plaintiff's subjective statements.

20 Even if the ALJ intended to find that such daily activities undermined the
21 credibility of plaintiff's subjective complaints, the ALJ did not specify *which* of
22 plaintiff's daily activities purportedly conflicted with *which* of plaintiff's subjective
23 complaints. A general finding that plaintiff's collective daily activities are
24 inconsistent with the alleged severity of some or all of plaintiff's subjective
25 complaints is not sufficiently specific to permit the Court to determine whether the
26 ALJ discounted plaintiff's credibility on permissible grounds. *See, e.g.,*
27 *Brown-Hunter*, 806 F.3d at 494 (legal error where ALJ fails to link claimant
28 testimony ALJ found not credible to particular parts of record supporting non-

1 credibility determination) (citing *Burrell*, 775 F.3d at 1139).

2 The ALJ also discredited plaintiff's statements purportedly because
3 "[plaintiff's] alleged loss of function is not supported by objective medical findings."
4 (AR 17, 18). In the absence of any other clear and convincing reason, however, the
5 mere lack of supporting objective medical evidence is an insufficient basis for
6 discounting plaintiff's subjective statements. *See Burch v. Barnhart*, 400 F.3d 676,
7 681 (9th Cir. 2005) (Lack of objective medical evidence to support subjective
8 symptom allegations cannot form the sole basis for discounting pain testimony.).

9 Second, even so, the Function Report of the lay witness did not describe all the
10 *same* limitations as plaintiff's, and even identified greater functional limitation than
11 plaintiff did with respect to at least one significant activity. (Cf. AR 268 [plaintiff's
12 assertion that he could do "small chores" a "couple times a week" for "[an hour] or
13 so" depending on his condition] with AR 283 [lay witness assertion that plaintiff
14 could do certain household chores "[m]aybe 45 [minutes] – 1-2 times per week"])).

15 Finally, the lay witness stated that she had known plaintiff for "12 years" and
16 was with plaintiff "24/7." (AR 281). Hence, it is clear that many of her statements
17 regarding plaintiff's functioning (e.g., ability to perform certain household chores)
18 were based on her personal observations of plaintiff's actual daily activities, not
19 reiteration of plaintiff's subjective reports, such that the ALJ's reasons for rejecting
20 plaintiff's subjective complaints do not necessarily apply with *equal* force to the
21 statements of the lay witness. *See, e.g., Rivera*, 2013 WL 6002445, at *5 (ALJ's
22 rejection of lay evidence based on "lack of support" in the record "not harmless" error
23 where "lay witnesses' statements [were] based on their own observations, not
24 [plaintiff's] subjective reports," and thus the "[lay] statements may establish that
25 [plaintiff] is disabled even if [plaintiff's] testimony is rejected entirely").

26
27 ORDER

28 **The decision of the Commissioner of Social Security is reversed in part and**

1 **the matter is remanded for further administrative action consistent with the**
2 **Report and Recommendation and with this Order.**

3
4 Plaintiff-Appellant Michael Parrish's motion for summary judgment [**Doc #15**]
5 **is GRANTED in part and denied in part.**

6 Defendant-Appellee Social Security Commissioner's motion for summary
7 judgment [**Doc #20**] **is DENIED.**

8
9 The Clerk shall serve copies of this Order, the Report and Recommendation,
10 and the Judgment on counsel for the parties.

11 **Judgment will be entered by separate document.**

12
13 Dated: Thursday, March 16, 2017



14
15
16 Honorable Valerie Baker Fairbank
Senior United States District Judge